

SENATE BILL 3989
By Herron

AN ACT to amend Tennessee Code Annotated, Title 47,
and to enact the "Tennessee Home Loan
Protection Act of 2006".

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Title 47, is amended by adding Sections 2 through 10 of this act as a new Chapter 20.

SECTION 2. This chapter shall be known and may be cited as the "Tennessee Home Loan Protection Act".

SECTION 3. As used in this chapter, unless the context otherwise requires:

(1) "Affiliate" means any company that controls, is controlled by, or is under common control with another company, as set forth in 12 U.S.C. §1841 et seq.;

(2) "Annual percentage rate" means the annual percentage rate for the loan calculated at closing according to the provisions of 12 C.F.R. Part 226;

(3) "Bona fide discount points" means loan discount points knowingly paid by the borrower for the express purpose of reducing, and which in fact do result in a bona fide reduction of, the interest rate applicable to the home loan; provided, that the undiscounted interest rate for the home loan does not exceed the conventional mortgage rate by more than two (2) percentage points for a home loan secured by a first lien, or by more than three and one-half (3.5) percentage points for a home loan secured by a junior lien;

(4) "Borrower" means any natural person obligated to repay the loan, including a co-borrower, cosigner, or guarantor;

(5) "Conventional mortgage rate" means the most recently published annual yield on conventional mortgages published by the board of governors of the federal reserve system, as published in statistical release H.15 or any publication that may supersede it, as of the applicable time set forth in 12 C.F.R. 226.32(a)(1)(i);

(6) "Conventional prepayment penalty" means any prepayment penalty or fee that may be collected or charged in a home loan, and that is authorized by law other than this chapter, provided the home loan does not have an annual percentage rate that exceeds the conventional mortgage rate by more than two (2) percentage points and does not permit any prepayment fees or penalties that exceed two percent (2%) of the amount prepaid;

(7) "Creditor" means the same as "lender" as set forth in 24 C.F.R. 3500.2 and shall also mean a mortgage broker;

(8) "Excluded points and fees" means, in connection with a home loan, one percent (1%) of the total loan amount attributable to bona fide fees paid to a federal or state government agency that insures payment of some portion of a home loan plus an amount not to exceed two percent (2%) of the total loan amount attributable to bona fide discount points or a conventional prepayment penalty;

(9) "High-cost home loan" means a home loan in which the terms of the loan meet or exceed one (1) or more of the thresholds as defined in subdivision (13);

(10) "Home loan" means an extension of credit, including an open-end credit plan, in which:

(A) The loan is such that it does not exceed the maximum original principal obligation as set forth in and from time to time adjusted according to the provisions of 12 U.S.C. §1454(a)(2);

(B) The loan is such that it is considered a federally related mortgage loan as set forth in 24 C.F.R. 3500.2; and

(C) The loan is neither a reverse mortgage transaction nor a loan primarily for business, agricultural, or commercial purposes;

(11) "Mortgage broker" means the same as set forth in 24 C.F.R. 3500.2;

(12) "Points and fees" means:

(A) All items included in the definition of finance charge in 12 C.F.R. 226.4(a) and 12 C.F.R. 226.4(b) except interest or the time price differential;

(B) All items described in 12 C.F.R. 226.32(b)(1)(iii);

(C) All compensation paid directly or indirectly to a mortgage broker from any source, including a broker that originates a loan in its own name in a table-funded transaction;

(D) The cost of all premiums financed by the creditor, directly or indirectly for any credit life, credit disability, credit unemployment or credit property insurance, or any other life or health insurance, or any payments financed by the creditor directly or indirectly for any debt cancellation or suspension agreement or contract, except that insurance premiums or debt cancellation or suspension fees calculated and paid on a monthly basis shall not be considered financed by the creditor;

(E) The maximum prepayment fees and penalties that may be charged or collected under the terms of the loan documents; and

(F)

(i) All prepayment fees or penalties that are incurred by the borrower if the loan refinances a previous loan made or currently held by the same creditor or an affiliate of the creditor;

(ii) For open-end loans, the points and fees are calculated by adding the total points and fees known at or before closing, including the maximum prepayment penalties which may be charged or collected under the terms of the loan documents, plus the minimum additional fees the borrower would be required to pay to draw down an amount equal to the total credit line.

(iii) Points and fees shall not include:

(a) Taxes, filing fees, recording, and other charges and fees paid or to be paid to public officials for determining the existence of or for perfecting, releasing, or satisfying a security interest; or

(b) Bona fide and reasonable fees paid to a person other than the creditor or an affiliate of the creditor for the following: fees for tax payment services; fees for flood certification; fees for pest infestation and flood determination; appraisal fees; fees for inspections performed prior to closing; credit reports; surveys; attorneys' fees, if the borrower has the right to select the attorney from an approved list or otherwise; notary fees; escrow charges, so long as not otherwise included under subdivision (A); title insurance premiums; and fire and hazard insurance and flood insurance premiums, provided that the conditions in 12 C.F.R. 226.4(d)(2) are met;

(13) "Rate threshold" means for a home loan, the annual percentage rate equals or exceeds the rate set forth in 12 C.F.R. 226.32(a)(1)(i), without regard to whether the

home loan may be considered a residential mortgage transaction or an extension of open-end credit as those terms are set forth in 12 C.F.R. 226.2;

(14) "Servicer" means the same as set forth in 24 C.F.R. 3500.2;

(15) "Servicing" means the same as set forth in 12 C.F.R. 3500.2 and shall also include any other activities or responsibilities undertaken in connection with a home loan by a person who acts as a servicer with respect to that home loan, including collection and default management functions;

(16) "Total loan amount" means the principal of the loan minus those points and fees as defined in subdivision (12) that are included in the principal amount of the loan. For open-end loans, the total loan amount shall be calculated using the total line of credit allowed under the home loan at closing; and

(17) "Total points and fees threshold" means total points and fees payable in connection with the home loan equal or exceed five percent (5%) of the total loan amount, excluding either a conventional prepayment penalty or up to two (2) bona fide discount points:

(A) For loans in which the total loan amount is twenty thousand dollars (\$20,000) or more, the total points and fees payable in connection with the home loan equal or exceed five percent (5%) of the total loan amount, less any excluded points and fees; and

(B) For loans in which the total amount loan amount is less than twenty thousand dollars (\$20,000), the total points and fees payable in connection with the home loan less any excluded points and fees exceed the lesser of eight hundred dollars (\$800) or eight percent (8%) of the total loan amount.

SECTION 4. The following acts and practices are prohibited in the making of a home loan:

(1) No creditor shall recommend or encourage default on an existing loan or other debt prior to and in connection with the closing or planned closing of a home loan that refinances all or any portion of such existing loan or debt;

(2) No creditor shall knowingly or intentionally engage in the unfair act or practice of "flipping" a home loan. "Flipping" a home loan is the making of a home loan to a borrower that refinances an existing home loan when the new loan does not have reasonable, tangible net benefit to the borrower considering all of the circumstances, including the terms of both the new and refinanced loans, the cost of the new loan, and the borrower's circumstances;

(3) No borrower may incur a late payment charge unless the loan documents specifically authorize the charge, the charge is not imposed unless the payment is past due for ten (10) days or more, and the charge does not exceed five percent (5%) of the amount of the late payment. A late payment charge may not be imposed more than once with respect to a particular late payment. If a late payment charge is deducted from a payment made on the home loan and such deduction results in a subsequent default on a subsequent payment, no late payment charge may be imposed for such default. A creditor or servicer may apply any payment made in the order of maturity to a prior period's payment due even if the result is late payment charges accruing on subsequent payments due;

(4) No home loan may contain a provision which permits the lender, in its sole discretion, to accelerate the indebtedness. This provision does not apply when repayment of the loan has been accelerated by default, pursuant to a due-on-sale provision, or pursuant to some other provision of the loan documents unrelated to the payment schedule;

(5) No creditor making a home loan shall finance, directly or indirectly, any credit life, credit disability, credit unemployment or credit property insurance, or any other life or health insurance, or any payments directly or indirectly for any debt cancellation or suspension agreement or contract, except that insurance premiums or debt cancellation or suspension fees calculated and paid on a monthly basis shall not be considered financed by the creditor; and

(6) No creditor may charge a fee for informing or transmitting to any person the balance due to pay off a home loan or to provide a release upon prepayment. Payoff balances shall be provided within a reasonable time, but in any event no more than seven (7) business days after the request.

SECTION 5.

(a) The following acts or practices are prohibited in the making of a high-cost home loan:

(1) In connection with a high-cost home loan, no creditor shall directly or indirectly finance any points or fees;

(2) No prepayment fees or penalties shall be included in the loan documents or charged under the terms of a high-cost home loan;

(3) No high-cost home loan may contain a scheduled payment that is more than twice as large as the average of earlier scheduled payments. This provision shall not apply when the payment schedule is adjusted to the seasonal or irregular income of the borrower;

(4) No high-cost home loan may include payment terms under which the outstanding principal balance or accrued interest will increase at any time over the course of the loan because the regularly scheduled periodic payments do not cover the full amount of interest due;

(5) No high-cost home loan may contain a provision that increases the interest rate after default. This provision does not apply to interest rate changes in a variable rate loan otherwise consistent with the provisions of the loan documents, provided the change in the interest rate is not triggered by the event of default or the acceleration of the indebtedness;

(6) No high-cost home loan may include terms under which more than two (2) periodic payments required under the loan are consolidated and paid in advance from the loan proceeds provided to the borrower;

(7) A creditor may not make a high-cost home loan without first receiving certification from a counselor with a third-party nonprofit organization approved by the United States department of housing and urban development, a housing financing agency of this state, or the regulatory agency which has jurisdiction over the creditor, that the borrower has received counseling on the advisability of the loan transaction;

(8) A high-cost home loan shall not be extended to a borrower unless a reasonable creditor would believe at the time the loan is closed that the borrower residing in the home will be able to make the scheduled payments associated with the loan based upon a consideration of his or her current and expected income, current obligations, employment status, and other financial resources, other than the borrower's equity in the collateral that secures the repayment of the loan. There is a rebuttable presumption that the borrower residing in the home is able to make the scheduled payments to repay the obligation if, at the time the loan is consummated, such borrower's total monthly debts, including amounts under the loan, do not exceed fifty percent (50%) of such borrower's

monthly gross income as verified by tax returns, payroll receipts, and other third-party income verification; and

(9) A creditor may not pay a contractor under a home-improvement contract from the proceeds of a high-cost home loan, unless:

(A) The creditor is presented with a signed and dated completion certificate showing that the home improvements have been completed; and

(B) The instrument is payable to the borrower or jointly to the borrower and the contractor, or, at the election of the borrower, through a third-party escrow agent in accordance with terms established in a written agreement signed by the borrower, the creditor, and the contractor prior to the disbursement.

(b) All high-cost home loan documents that create a debt or pledge property as collateral shall contain the following notice on the first page in a conspicuous manner: 'Notice: This is a high-cost home loan subject to special rules under state law. Purchasers or assignees of this high-cost home loan may be liable for all claims and defenses by the borrower with respect to the home loan.'

SECTION 6.

(a) If a creditor or servicer asserts that grounds for acceleration exist and requires the payment in full of all sums secured by the security instrument, the borrower, or anyone authorized to act on the borrower's behalf, shall have the right at any time, up to the time title is transferred by means of foreclosure by judicial proceeding and sale or otherwise, to cure the default and reinstate the home loan by tendering the amount or performance. Cure of default shall reinstate the borrower to the same position as if the

default had not occurred and shall nullify, as of the date of the cure, any acceleration of any obligation under the security instrument or note arising from the default.

(b) Before any action filed to foreclose upon the home or other action is taken to seize or transfer ownership of the home, a notice of the right to cure the default must be delivered to the borrower informing the borrower of the following:

(1) The nature of default claimed on the home loan, and of the borrower's right to cure the default by paying the sum of money required to cure the default, provided that a partial payment made or tendered in response to such notice must be accepted. If the amount necessary to cure the default will change during the thirty-day period after the effective date of the notice, due to the application of a daily interest rate or the addition of late fees, the notice shall give sufficient information to enable the borrower to calculate the amount at any point during the thirty-day period;

(2) The date by which the borrower shall cure the default to avoid acceleration and initiation of foreclosure, or other action to seize the home, which date shall not be less than thirty (30) days after the date the notice is effective, and the name and address and phone number of a person to whom the payment or tender shall be made;

(3) That if the borrower does not cure the default by the date specified, steps may be taken to terminate the borrower's ownership in the property by requiring payment in full of the home loan and commencing a foreclosure proceedings or other action to seize the home; and

(4) The name and address of the creditor or servicer and the telephone number of a representative of such person whom the borrower may contact if the

borrower disagrees with the assertion that a default has occurred or the correctness of the calculation of the amount required to cure the default.

(c) To cure a default under this subsection, a borrower shall not be required to pay any charge, fee or penalty attributable to the exercise of the right to cure a default as provided for in this section, other than the fees specifically allowed by this section. The borrower shall not be liable for any attorney fees relating to the borrower's default that are incurred by the creditor prior to or during the thirty-day period set forth in this section. After a creditor files a foreclosure action or takes other action to seize or transfer ownership of the home, the borrower shall only be liable for attorneys' fees that are reasonable and actually incurred by the creditor, based on a reasonable hourly rate and a reasonable number of hours.

(d) If a default is cured after the initiation of any action to foreclose, the creditor and servicer shall take such steps as are necessary to terminate the foreclosure proceeding or other action.

SECTION 7.

(a) Any person who purchases or is otherwise assigned a high-cost home loan shall be subject to all affirmative claims and any defenses with respect to the loan that the borrower could assert against the original creditor of the loan; provided, that the provisions of this subsection (a) shall not apply if the purchaser or assignee demonstrates by a preponderance of the evidence that it:

(1) Has in place at the time of the purchase or assignment of the subject loans, policies that expressly prohibit its purchase or acceptance of assignment of any high-cost home loans;

(2) Requires by contract that a seller or assignor of home loans to the purchaser or assignee represents and warrants to the purchaser or assignee that

either the seller or assignor will not sell or assign any high-cost home loans to the purchaser or assignee or that such seller or assignor is a beneficiary of a representation and warranty from a previous seller or assignor to that effect; and

(3) Exercises reasonable due diligence at the time of purchase or assignment of home loans or within a reasonable period of time after the purchase or assignment of such home loans, intended by the purchaser or assignee to prevent the purchaser or assignee from purchasing or taking assignment of any high-cost home loans; provided further, that reasonable due diligence shall provide for sampling and shall not require loan-by-loan review.

(b) Limited to amounts required to reduce or extinguish the borrower's liability under the high-cost home loan plus amounts required to recover costs, including reasonable attorneys' fees, a borrower acting only in an individual capacity may assert claims that the borrower could assert against a creditor of the high-cost home loan against any subsequent holder or assignee of the high-cost home loan as follows:

(1) Within five (5) years of the closing of a high-cost home loan, a violation of this act in connection with the loan as an original action; and

(2) At any time during the term of a high-cost home loan, after an action to collect on the home loan or foreclose on the collateral securing the home loan has been initiated or the debt arising from the home loan has been accelerated or the home loan is sixty (60) days in default, any defense, claim or counterclaim, or action to enjoin foreclosure or preserve or obtain possession of the home that secures the loan.

(c) Nothing in this section shall be construed to limit the substantive rights, remedies or procedural rights available to a borrower against any creditor, assignee or

holder under any other law. The rights conferred on borrowers by subsections (a) and (b) are independent of each other and do not limit each other.

SECTION 8.

(a)

(1) A person aggrieved by a violation of this chapter must bring suit to enforce the rights conferred hereunder no later than five (5) years after the later of:

(A) The date of consummation of the loan that is alleged to have violated the act; or

(B) The date on which the aggrieved person discovers or should have discovered the violation of the chapter.

(2) Any violation of this chapter constitutes a violation of the Tennessee Consumer Protection Act, with all the remedies available thereunder.

(3) Any person found by a preponderance of the evidence to have violated this chapter shall also be liable to the borrower for the following:

(A) Actual damages, including consequential and incidental damages. The borrower shall not be required to demonstrate reliance upon this act in order to receive actual damages; and

(B) Statutory damages:

(i) For violations of Section 4 or 5, damages shall equal up to two (2) times the finance charge paid under the loan and forfeiture of the remaining interest under the loan;

(ii) Punitive damages, when the violation was malicious or reckless; and

(iii) Reasonable costs including reasonable attorneys' fees.

(b) The right of rescission granted under 15 U.S.C. §1601 et seq. for a violation of that act and all other remedies provided hereunder for a violation of this chapter shall be available to a borrower by way of recoupment against a creditor foreclosing on the home loan or collecting on the loan, at any time during the term of the loan.

(c) The making, brokering or servicing of a home loan that violates the provisions of this chapter shall constitute a violation of such provisions.

(d) The remedies provided in this section are not intended to be the exclusive remedies available to a borrower, nor must the borrower exhaust any administrative remedies provided under this chapter or any other applicable law before proceeding under this section.

(e) A creditor in a home loan who, when acting in good faith, fails to comply with the provisions of this chapter, will not be deemed to have violated this section if the creditor establishes that either:

(1) Within thirty (30) days of the loan closing, and prior to receiving any notice of the compliance failure, the creditor has made appropriate restitution to the borrower, and appropriate adjustments are made to the loan; or

(2) Within sixty (60) days of the loan closing and prior to receiving any notice of the compliance failure, and the compliance failure was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid such errors, the borrower is notified of the compliance failure, appropriate restitution is made to the borrower, and appropriate adjustments are made to the loan. Examples of a bona fide error include clerical, calculation, computer malfunction and programming, and printing errors. An error of legal judgment with respect to a person's obligations under this section is not a bona fide error.

(f) The remedies provided by this section are cumulative.

(g) Notwithstanding any other provision of state law, no home loan agreement shall include any provision that waives any borrower's remedies available at law or equity, whether acting individually or on behalf of others similarly situated, or the borrower's rights to civil discovery or appeal. In addition, without regard to whether a borrower is acting individually or on behalf of others similarly situated, any provision of a home loan agreement that allows a person to require a borrower to assert any claim or defense in a forum that is less convenient, more costly, or more dilatory for the resolution of a dispute than a judicial forum established in this state where the borrower may otherwise properly bring a claim or defense or limits in any way any claim or defense the borrower may have is unconscionable and void.

(h) It shall be a violation of this chapter for any person to attempt in bad faith to avoid the application of this act by dividing any loan transaction into separate parts for the purpose of evading the provisions of this act when the loan would have been a high-cost home loan or engaging in any other subterfuge with the intent of evading any provision of this chapter.

SECTION 9. The department of financial institutions, the attorney general and the district attorneys of this state shall have jurisdiction to enforce this chapter through their general regulatory powers and through civil process.

SECTION 10. The rights conferred by this chapter are independent of and in addition to any other rights provided under other laws.

SECTION 11. The provisions of this act shall be severable, and if any phrase, clause, sentence, or provision is declared to be invalid or is preempted by federal law or regulation, the validity of the remainder of this act shall not be affected thereby. If any provision of this act is declared to be inapplicable to any specific category, type, or kind of loan or points and fees, the

provisions of this act shall nonetheless continue to apply with respect to all other loans and points and fees.

SECTION 12. This act shall apply to all loans originated or entered into after the effective date of this act, except that, to the extent that the provisions of this act are inconsistent with the regulations of the United States comptroller of the currency, they shall not apply to federally chartered banks or their operating subsidiaries.

SECTION 13. This act shall take effect January 1, 2007, the public welfare requiring it.